

Decision 06-04-042

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Rehearing of Commission  
Decision Approving the Filing of Reply  
Comments in FERC Docket RM06-10.

Application 06-03-022

**ORDER DENYING “APPLICATION FOR REHEARING AND REQUEST FOR  
AN EMERGENCY RULE 86 COMMISSION MEETING REGARDING MARCH  
15, 2006 COMMISSION DECISION APPROVING THE FILING OF REPLY  
COMMENTS IN FERC DOCKET RM06-10 BY MARCH 29, 2006”**

At the March 15, 2006 Commission meeting, we authorized Commission staff to submit reply comments in the Federal Energy Regulatory Commission’s (“FERC”) rulemaking to amend FERC regulations governing small power production and cogeneration. Specifically, staff sought authorization to comment on implementation of Section 1253 of the Energy Policy Act of 2005 (“EPAct 2005”), which added Section 210(m) of the Public Utility Regulatory Policies Act of 1978 (“PURPA”). (16 U.S.C. §824a-3, subd. (m).)<sup>1</sup>

On March 24, 2006, the Cogeneration Association of California, the Energy Producers and Users Coalition and the Independent Energy Producers Association (“CAC/EPUC/IEP”) filed a document with the Commission entitled “Application for Rehearing and Request for an Emergency Rule 86 Commission Meeting Regarding March 15, 2006 Commission Decision Approving the Filing of Reply Comments in

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<sup>1</sup> Staff’s memorandum requesting authorization was listed as Item 29 on the March 15, 2006 Agenda.

FERC Docket RM06-10 by March 29, 2006” (“application”). In their filing, CAC/EPUC/IEP assert that by authorizing staff to file comments in the FERC rulemaking, the Commission has prejudged qualifying facility (“QF”) policy issues currently under consideration in Rulemaking (R.) 04-04-025 and R.04-04-003. As a result, CAC/EPUC/IEP claim the Commission violated their right to due process in the Commission proceedings. They further request that, since reply comments are to be filed with the FERC before the April 13 Commission meeting,<sup>2</sup> the Commission consider and dispose of their application in an emergency meeting. Pacific Gas and Electric Company (“PG&E”) filed a response on March 27, 2006 opposing CAC/EPUC/IEP’s application.

Given the unusual circumstances under which CAC/EPUC/IEP filed their application, we decided to accept their filing as an “Application for Rehearing,” so that we could consider whether the filing constitutes a proper application for rehearing under Public Utilities Code section 1731.<sup>3</sup> As we further explain below, the filing does not and, thus, shall be dismissed.

CAC/EPUC/IEP seek “rehearing” of our authorization to staff to submit reply comments in a proceeding before the FERC pursuant to Article 21 of the Commission’s Rules of Practice and Procedure. (Application, p. 2.) Their application is based on their argument that the authorization constitutes a “decision” under section 1731. CAC/EPUC/IEP are mistaken.

Not every action taken during a Commission meeting is subject to review pursuant to section 1731. Rather, section 1731 only applies to a specific type of action – orders or decisions of the Commission arising out of a Commission proceeding. This is clear from the language of the statute. For example, section 1731(b) notes that “date of

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<sup>2</sup> The Staff Memorandum indicated that the deadline to file reply comments with the FERC is March 29, 2006.

<sup>3</sup> Unless otherwise stated, all statutory references are to the Public Utilities Code.

issuance” is “the date when the commission mails the order or decision to the parties to the action or proceeding.” Further, Rule 78 of the Commission’s Rules of Practice and Procedure notes in relevant part: “Commission meetings shall be held on a regularly scheduled basis to consider and vote on decisions and orders *and to take such other action as the Commission deems appropriate.* (Cal. Code Regs., tit. 20, §78, subd. (a) (emphasis added).) Therefore, it is clearly contemplated that the Commission could do more than simply vote on orders and decisions at its meetings.

In this instance, the parties are challenging our authorization to staff to participate in a proceeding before another administrative agency. This authorization did not result in an order or decision “issued” by the Commission. Nor was staff’s request for authorization arising from a Commission proceeding. Therefore, our action does not constitute an order or decision subject to section 1731. Indeed, interpreting section 1731 to apply to our authorization would likely constrain our ability to represent California’s interests effectively before federal agencies such as the FERC or the Federal Communications Commission.

Although CAC/EPUC/IEP’s application alleges that R.04-04-003 and R.04-04-025 are also addressing the same QF issues, this does not support a finding that we somehow issued an order or decision in those proceedings when we decided to act in the FERC rulemaking. (Application, p. 2.) As CAC/EPUC/IEP acknowledge, no decision or order has been issued yet in these two proceedings addressing QF pricing and policy issues. (Application, p. 9.) Thus, to some extent, CAC/EPUC/IEP are speculating on the outcome of these two proceedings. Should they want to challenge a future decision arising from these two proceedings on the issue of prejudgment, CAC/EPUC/IEP may raise this challenge after we have issued the final decision in R.04-04-003 and R.04-04-025, pursuant to section 1731.

Based on the above, we find that CAC/EPUC/IEP’s application does not constitute a proper application for rehearing and, therefore, shall be dismissed. Although

we are dismissing CAC/EPUC/IEP's application on procedural grounds, this does not mean that they are being denied an opportunity to raise their claim of prejudgment. Rather, CAC/EPUC/IEP may raise this same issue of prejudgment in a challenge of a decision issued in R.04-04-003 and R.04-04-025, if they so desire. Finally, since we are dismissing CAC/EPUC/IEP's application, their request for an emergency Commission meeting is denied as moot.

Therefore **IT IS ORDERED** that:

1. Application (A.) 06-03-022 is dismissed.
2. CAC/EPUC/IEP's request for an emergency Commission Meeting is denied.
3. Application 06-03-022 is hereby closed.

This order is effective today.

Dated April 13, 2006, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners